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No. 86-397

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CHURCH OF ST. PAUL AND ST. ANDREW,

Petitioner,

-against-

KENT L. BARWICK, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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November 3, 1986
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COUNTER-QUESTIONS PRESENTED

1. Does a controversy ripe for judicial review exist where petitioner, owner of a designated landmark building, asserting hardship by reason of the designation, declines to seek relief from the landmark designation provided by the landmark statute as interpreted by New York state courts?

2. Is the Free Exercise clause implicated in the designation of a landmark because the landmark building is a place of religious worship, where the landmark law provides relief if the owner demonstrates that the building is not adequate, suitable or appropriate to its purposes?

3. Assuming, arguendo, that a Free Exercise question may be implicated, is there a sufficiently developed record herein for a proper adjudication by this Court?

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RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

STATEMENT OF THE CASE

Petitioner seeks to have this Court review by writ of certiorari an order of the New York State Court of Appeals, entered June 5, 1986, which affirmed an order of the New York Supreme Court, Appellate Division, First Department, entered April 25, 1985, which affirmed, without opinion, an order and judgment of the New York

Supreme Court, New York County, entered September 17, 1984, granting respondents' motion for summary judgment and dismissing the petition on the ground that there existed no controversy ripe for judicial review. Petitioner challenged the Landmarks Law as applied to it, alleging that it effected a "taking" of property without due process or just compensation and interfered with the free exercise of religion. Respondents argued that no controversy existed since the petitioner refused to apply to the Commission for a Certificate of Appropriateness to reconstruct, alter or demolish as required by the statutory scheme of the Landmarks Law (Administrative Code of the City of New York, §207.-5 et seq.). The New York State Court of Appeals (three judges dissenting) agreed with respondent that the case is not ripe for adjudication until after the Commission has had an opportunity to

act upon an application by petitioner to effectuate its rebuilding plan, portions of which involve secular usages.

Procedural Background

During the fall of 1979, the Landmarks Preservation Commission's research staff compiled a proposed list of buildings to be considered by the Commission for possible designation as landmarks in 1980, including the Church of St. Paul and St. Andrew. The Commission included the Church on its 1980 priority list, and, on or about January 2, 1980, the Church was notified that a public hearing on its possible designation was calendared for March, 1980. The hearing was held and then continued to May 13, 1980, at the request of the Church. At both hearings, officials of the Church and their legal counsel opposed designation on the ground of financial hardship. The Commission's position, based upon §207-1.0

of the Administrative Code of the City of New York, is that, in determining whether to designate a building a landmark, the only criterion to be considered is the historical and aesthetic value of the structure itself. The Chairman of petitioner's Board of Trustees stated that the Church intended to convert a portion of its property into an income-producing use, i.e., a residential building. See, Opinion of the New York State Court of Appeals, Appendix 5a. In a statement to the Landmarks Commission on June 17, 1980, he stated:

> "The Church's only hope of saving itself is to convert a portion of its property into an income producing use. Specifically, the Church desires to preserve a significant portion of its sanctuary, including the corner tower, and to develop on the remainder of its land a residential building. In this way the Church could remain at its current location, save as much of its current structure as possible, and create an income source that would permit the Church to continue to exist."

At the further request of the Church, the record of the hearing was several times kept open for additional periods of several months each, so that additional information could be submitted to the Commission.

Prior to the public hearing, Counsel to the Commission, the Executive Director of the Commission and the Chairman of the Commission met with various officials of the Church and apprised them of what steps they could take pursuant to the Landmarks Law in the event that the properties were designated landmarks and they sought to reconstruct, alter or demolish the designated property. At that time, both the statutory procedure applicable to tax-exempts who wish to alienate their landmarked property and the judicially-created procedure for tax-exempts who do not wish to alienate but to reconstruct or demolish were explained to plaintiff.

The Landmark Designation of the Church

The Church of St. Paul and St. Andrew was designated a landmark by the Commission on November 24, 1981. Designation was approved by the Board of Estimate on March 18, 1982. There is no dispute regarding the importance and quality of the landmarked church and attached parish house. The lot upon which the Church stands is 150 by 125 square feet, and consists of the Church and attached parish house, a rectory and a courtyard. Only the exterior of the Church and the parish house were designated landmarks. Neither the interiors of the Church and the parish house nor the rectory and the remaining property are covered by the designation. Although the rectory was considered for landmark designation, it was found not to meet the statutory criteria and was not designated.

On March 23, 1982, five days after Board of Estimate's approval of designation, petitioner commenced the instant action pursuant to 42 U.S.C. §1983, seeking a declaratory judgment, an injunction and damages. Specifically, plaintiff sought a declaration that the designation of its building as a landmark was unconstitutional and that the Landmarks Law, as applied to it, was unconstitutional. In its answer, the Commission raised as a defense, inter alia, plaintiff's failure to exhaust administrative remedies and failure to state a cause of action, alleging that plaintiff failed to apply to the Commission for relief pursuant to Landmarks Law, §207-5.0, et seq. Petitioner argued, citing Patsy v. Florida Board of Regents, 457 U.S. 496 (1982), that petitioner is not required to exhaust administrative remedies in a section 1983 action. Thereafter, the Commission made a

motion to amend its answer to allege, based upon the same facts, failure to raise issues ripe for judicial review rather than exhaustion of remedies and for summary judgment on the ground that the action is premature since petitioner failed to apply to the Commission for either a Certificate of Appropriateness or for hardship relief and, therefore, had failed to raise issues ripe for judicial review.

The Landmarks Law - Regulatory Scheme

In 1965, the City of New York established a comprehensive program for historic preservation by adding §2004 to the New York City Charter (now §534) and Administrative Code of the City of New York, Chapter 8-A, §205-1.0 et seq. ("the Landmarks Law"). The City Council has set forth a statement in §205-1.0 of the public policy sought to be furthered by this enactment; the legislative findings set forth

therein state that "many improvements, representing the finest architectural products of distinct periods in the history of the city, have been uprooted notwithstanding the feasibility of preserving and continuing the use of such improvements . . . and without adequate consideration of the irreplaceable loss to the people of the city of the aesthetic, cultural and historic values represented by such improvements." Id.

The Landmarks Preservation Commission is composed of eleven members, including "at least three architects, one historian qualified in the field, one city planner or landscape architect, and one realtor." New York City Charter, §534.1. The Commission is empowered to designate landmarks, interior landmarks and historic districts after

holding public hearings.[1] Landmarks Law, §207-2.0. In determining whether to designate a building or other improvement as a landmark, the only statutorily-recognized criterion to be considered by the Commission is the building's "special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation..." §207-1.0 n. Thereafter, the Commission is authorized to regulate construction, reconstruction, alteration and demolition of any landmark site or any improvement parcel or portion thereof located in an historic district.

Designation does not preclude a landmark structure from being changed.

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[1]Since 1965, the Commission has designated approximately 730 landmarks and 48 historic districts.

Instead, recognizing the numerous circumstances under which a property owner might seek to alter or even demolish a designated building, the Landmarks Law contains a comprehensive scheme of regulatory options under which an owner can apply to the Commission for permission to make changes. The Commission issues a Permit for Minor Work pursuant to §207-9.0 if the alteration does not require a Building Department permit; the Commission must make its determination within 20 working days of the owner's filing of the application. If a Building Department permit is required, the Commission issues a Certificate of No Effect on Protected Architectural Features pursuant to §207-5.0 if it determines that the proposed work will not change, destroy or affect any exterior architectural feature of the improvement; the Commission must make such determination within 30 days of

the filing of the application. Otherwise, the Commission considers the application under the criteria for a Certificate of Appropriateness pursuant to §207-6.0. If the application is for an individual landmark, the Commission is to consider

> "the effects of the proposed work upon the protection, enhancement, perpetuation and use of the exterior architectural features of such landmark which cause it to possess a special character or special historical or aesthetic interest or value." §207-6.0(d).

In connection with each application for a Certificate of Appropriateness, the Commission holds a public hearing; it must make its determination within 90 days of filing. §207-7.0. In recent years, the Commission has granted, on an annual basis, approximately 1500 of these different types of permits.

The Hardship Procedure

In cases where the Commission denies a request for a Certificate of Appropriateness, and in cases where the owner seeks total demolition of a landmark, the Landmarks Law contains a procedure for a "request for Certificate of Appropriateness authorizing demolition, alterations or reconstruction on ground of insufficient return" (§207-8.0), commonly known as the "hardship" provision of the Landmarks Law. This provision, together with the applicable procedures for a Certificate of Appropriateness referred to above, afford landmark owners ample protection against even the most remote and speculative threat of an unconstitutional "taking" by the Commission. For parcels which are subject to real estate taxes, the Landmarks Law authorizes a property owner to alter inappropriately or demolish his designated structure if 1) the Commission

determines that the property is yielding an insufficient return; 2) the Commission cannot develop a plan acceptable to the owner to eliminate the hardship; and 3) the City does not exercise its condemnation powers to acquire the property (§207-8.0).

With regard to tax-exempt parcels,[2] the Commission's determination of "insufficient return" is based on a different set of findings.[3] The statute provides that the owner demonstrate 1) that there is an agreement to sell or lease contingent upon Commission authorization of demolition or inappropriate alteration; 2) that the property

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[2]Plaintiff's church property is, of course, exempt from real estate taxes under §421-a of the New York Real Property Tax Law.

[3]These provisions of the statute were extensively discussed with approval by this Court in Penn Central Transportation Co. v. New York City, supra, 438 U.S. at 110-113, n.13 (1978).

could not earn a reasonable return if it were not tax-exempt; 3) that the structure is no longer adequate, suitable, or appropriate to its past or present purposes; and 4) that the prospective buyer intends promptly to alter or demolish the structure (§207-8.0[a][2]). While this section is worded so as to condition the preliminary finding of insufficient return upon proof of an agreement to sell or lease the property, the Commission has made such a preliminary finding in the absence of such contracts based on the judicially-created hardship test discussed below.

In a situation in which the applicant is unable to meet the statutory criteria set forth above, the Commission will still make a preliminary finding of insufficient return if the applicant meets the judicially-created test for hardship, as set forth in Society for Ethical Culture v. Spatt, 51 NY2d 449

(1980),415 NE2d 922, Lutheran Church v. City of New York, 35 NY2d 121 (1974), 316 NE2d 305 and Sailors' Snug Harbor v. Platt, 29 AD2d 376 (1st Dept., 1968), 288 NYS2d 314. The test requires that, if a charitable or religious institution not desiring to sell or lease its property can establish that designation restrictions financially or physically prevent or seriously interfere with its charitable or religious activities being carried out in the building, a preliminary finding of "insufficient return" shall be made. However, this finding will be conditioned upon the applicant's demonstrating that the proposed alterations are being carried out to remedy the designated building's inadequacy or inappropriateness, and that the charitable or religious owner intends to proceed with the proposed alterations with reasonable promptness. Once the preliminary finding of

insufficient return is made under either the statutory or judicially-created test for hardship, 1) the Commission may thereafter develop an alternative plan acceptable to the owner or 2) the City may, upon the recommendation of the Commission, exercise its condemnation powers to acquire the property. Failing this, the Commission must issue a Notice to Proceed with demolition or with inappropriate alteration.

ARGUMENT

THE CONSTITUTIONALITY OF THE ACT OF LANDMARK DESIGNATION HAS BEEN UPHELD ON THE GROUND THAT IT DOES NOT CONSTITUTE A "TAKING" OF PROPERTY. MOREOVER, BY VIRTUE OF THE POST-DESIGNATION REGULATORY SCHEME, THE COMMISSION IS EMPOWERED TO GRANT RELIEF FROM THE RESTRICTIONS OF THE LANDMARK DESIGNATION OF A RELIGIOUS BUILDING UPON APPLICATION. SINCE PETITIONER HAS FAILED TO APPLY TO THE COMMISSION FOR ANY RELIEF FROM LANDMARK RESTRICTIONS, NO CONTROVERSY EXISTS AND THE CASE IS NOT RIPE FOR JUDICIAL REVIEW. THE FACT THAT PETITIONER IS A RELIGIOUS ORGANIZATION IS IRRELEVANT TO THE QUESTION OF WHETHER THERE IS AN UNCONSTITUTIONAL "TAKING" AND DOES NOT, PER SE, IMPLICATE THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

Petitioner purports to challenge the constitutionality of the Landmarks Law only insofar as it is applied to its property rather

than on its face, the facial constitutionality having been unequivocally upheld by this Court in Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978). We submit that petitioner does, in fact, challenge facial constitutionality and only facial constitutionality rather than merely an unconstitutional application of the statute to its property. It is obvious that the constitutionality of a statute may only be challenged by a plaintiff when the statute is applied or there is an imminent threat of its application to a specific right or interest of that plaintiff. This is the case whether the challenge is made to the facial constitutionality of the statute or to the constitutionality of the statute as applied. Unless there is an application or imminent threat of application of the statute to the plaintiff, the plaintiff would have no standing to challenge the statute either on

its face or as applied since the statute would have no affect upon him. See, Doe v. Bolton, 410 U.S. 179 (1973).

By contending that the very act of designation of the property of an objecting church involves a "taking without just compensation" which rises to the level of a deprivation or is violation of its free exercise rights, petitioner is challenging facial constitutionality. This Court determined that a designation of property as a landmark does not, solely by the fact of designation, constitute an unconstitutional "taking". Penn Central Transportation Company v. New York City, supra, 438 U.S. at 131. Nor can it be said that landmark designation, per se, impinges upon petitioner's free exercise rights. And it is the designation which constitutes the essence of petitioner's challenge herein. Only in a case, where the Commission has denied relief

from restrictions imposed by designation after an owner's application for a certificate of appropriateness or a demonstration of hardship pursuant to the hardship provisions of the Landmarks Law, may a challenge be properly termed a challenge to the constitutionality of the statute as applied. Since plaintiff has refused to avail itself of either the alteration procedures or the hardship procedures provided in the Landmarks Law, it may not challenge the constitutionality of the statute as applied to it since it has never been applied. If, after the Commission has been afforded an opportunity to fashion relief and has reached a final determination of the application, plaintiff believes itself unconstitutionally deprived of property because the relief from the requirements of its landmark designation by the Commission are insufficient, it may

then challenge the constitutionality of the statute as applied to it.

1. Since plaintiff has not applied to the Commission for relief pursuant to the regulatory scheme, the case is not ripe for judicial review.

In Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. ___ (1985), 105 S. Ct._____, 87 L. Ed.2d 126, 139, this Court stated that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." See also, Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264 (1981); Agins v. Tiburon, 447 U.S. 255 (1980); Willing v. Chicago Auditorium, 227 U.S. 274 (1928).

In Hodel v. Virginia Surface Mining and Reclamation Association, supra, 452 U.S. at 297, a decision upon which this Court relied in Williamson County, the Court rejected a claim that the Surface Mining Control and Reclamation Act of 1977 effected a "taking" because:

> "[t]here is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance from the approximate-original-contour requirement of §515(d) or a waiver from the surface mining restrictions in §522(e). If [the property owners] were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue decided by the District Court simply is not ripe for judicial resolution."

The above-stated principle is founded primarily upon the "oft-repeated admonition

that [questions of] constitutionality . . . ought not be decided except in an actual factual setting that makes such a decision necessary" and the recognition that, if a variance were sought, "a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional question." Hodel v. Virginia Surface Mining and Reclamation Association, supra, 452 U.S. at 294-95, 297. In addition, "it is common sense to permit the single, speedy, and inexpensive process of the administrative machinery to sift the facts and compile a complete record for the benefit of any reviewing courts." Moore v. City of East Cleveland, 431 U.S. 494, 524 (1977) (Burger, J., dissenting opinion). Further, the principle "allows application of an agency's specialized experience and the broad discretion granted to local entities,

such as zoning boards. Indeed, judicial review may be seriously hampered if the appropriate agency has no chance to apply its experience, exercise its discretion or make a factual record reflecting all aspects of the problem." Id. at 524-25.

2. Petitioner's due process claim and free exercise claim are premature because there has not been a "taking" of plaintiff's property and because plaintiff has not sought relief from the Commission.

As indicated above, the designation of a building as a landmark does not involve a "taking" of property in a constitutional sense. Penn Central Transportation Company v. New York City, supra, 438 U.S. 104. Thus, there can be no violation of plaintiff's Fifth Amendment and Fourteenth Amendment rights by virtue of the designation of its church building as a landmark.

Moreover, until there is a final decision by the Commission upon an application by plaintiff for relief from landmark restrictions allegedly interfering with the religious or charitable activities being carried out in the building, plaintiffs due process claim is premature. As this Court stated in Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra, 473 U.S.___, 105 S. Ct._____, 87 L. Ed.2d 126, 147, in disposing of the plaintiff's due process claims:

> "We need not pass upon the merits of petitioners' arguments, for even if viewed as a question of due process, respondent's claim is premature. Viewing a regulation that 'goes too far' as an invalid exercise of the police power, rather than as a 'taking' for which just compensation must be paid does not resolve the difficult problem of how to define 'too far,' that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. As we

> have noted, resolution of that question depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property. No such decision had been made at the time respondent filed its §1983 action, because respondent failed to apply for variances from the regulations."

In the case at bar, plaintiff has yet to apply to the Commission for relief from any alleged hardship to which it is being subjected. By its own choice it has refused to avail itself of the due process provided by statute. Until it has done so and the Commission has arrived at a final determination, no controversy exists. Therefore, plaintiff's due process claim and free exercise claim are premature.

Petitioner's claim that it is threatened with prosecutorial action initiated by the

City upon landmark designation is unsubstantiated upon the record herein or in any other case in the more than twenty year history of the Landmarks Law in New York City. While the law does impose a duty to maintain the landmark's exterior, no prosecutorial action would be or could be taken upon application by the owner of a landmark for relief from the consequences of landmark status. This is clearly the case in light of the short statutory periods permitted the Commission to consider applications for alterations and demolitions. Indeed, the instant record demonstrates the solicitude of the Commission for any potential hardship to petitioner as a result of landmarking as indicated by its offer to expedite any application by petitioner. Rather than threatened with prosecution, petitioner has at all times been encouraged to avail itself of the Landmarks Law's remedial provisions.

Petitioner's reliance upon Colautti v. Franklin, 439 U.S. 379 (1979), Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), Doe v. Bolton, 410 U.S. 179 (1973) and Pierce v. Society of Sisters, 268 U.S. 510 (1925), is misplaced. While the plaintiffs in these cases were not threatened with imminent prosecution, they were held to have standing to sue. However, none of these cases involved, as in the instant case, a statute which allowed individuals to seek an exemption from the statute's application as does the Landmarks Law. Simply by committing certain prohibited acts, the plaintiffs were liable to be prosecuted pursuant to the challenged statutes. In the instant case, petitioner, by applying to the Commission pursuant to statute, may be relieved of its duty of compliance with the requirements of the challenged statute. Thus, the cases are distinguishable on the

basis of the absence of an "escape" clause in the cases upon which petitioner relies and its presence in the instant case.

3. The Landmarks Law procedures provide adequate relief for any of the difficulties experienced by petitioner as a result of its alleged financial status and the alleged inadequacies of its building.

It should be noted at the outset that the Commission neither concedes nor denies that petitioner is without sufficient funds to maintain its landmarked building or that petitioner's building is inadequate for its religious or charitable activities. These issues were not germane to the sole issue before the Court on respondents' summary judgment motion, i.e., whether petitioner is required to apply to the Commission for relief before a controversy exists for judicial review. The Commission has no basis upon which to accept or reject allegations of hardship by petitioner nor any opportunity

to work with petitioner to seek to alleviate any such hardship since petitioner has refused to present its allegations of its financial hardship or the landmark's physical inadequacy or its plans for rebuilding its church and income-producing improvements in the proper, statutorily-designated forum for examination and evaluation by the Commission. In any case, since petitioner has yet to apply to the Commission for either a Certificate of Appropriateness in order to alter or a Notice to Proceed to alter or demolish inappropriately or to demolish, either of which, if granted, would alleviate the hardship to which it alleges it is being subjected, its challenge herein is premature.

a. The Landmarks Law "Certificate of Appropriateness" Procedure

Section 207-6.0 of the Landmarks Law provides for a grant of a Certificate of Appropriateness in cases where an applicant

seeks to construct, reconstruct, alter or demolish a landmark. The statute requires the Commission to determine "whether the proposed work would be appropriate for and consistent with the effectuation of the purposes of [the Landmarks Law]" and the Commission must grant the request if its determination on this question is in the affirmative.

As the New York Court of Appeals noted in determining the question of ripeness, petitioner has refused to apply for a Certificate of Appropriateness pursuant to section 207-6.0, although this section may well alleviate any and all alleged difficulties caused by the church's landmark status. 4a, 11a-13a. In fact, the only rebuilding plan to which petitioner referred on this record involved preservation of "a significant portion of its sanctuary, including the corner tower..." See, supra, page 4. Such

a proposal would fall squarely within the parameters of this section.

b. The Landmarks Law "Hardship" Procedure

Section 207-8.0(a)(2) of the Landmarks Law provides that in cases where property is tax-exempt, an applicant seeking a Notice To Proceed with demolition or inappropriate alteration on Ground of Insufficient Return must demonstrate that: (1) it has entered into the agreement to sell or lease the improvement subject to or contingent upon permission from the Commission to proceed; (2) the improvement would not be capable of earning a reasonable return if it were not tax-exempt; (3) the improvement has ceased to be suitable, adequate or appropriate for the purposes to which it is devoted and those purposes to which it had been devoted when acquired (unless the owner is no longer engaged in pursuing those purposes); and (4) the prospective purchaser or tenant,

in the case of an application for a permit to alter, seeks and intends in good faith to alter the premises with reasonable promptness.

In its petition, petitioner implies that this section is applicable only to commercial hardship. See page 13, n.7. However, commercial hardship is covered by section 207-8.0(a)(1). See, supra, page 13. Section 207-8.0(a)(2) applies solely to tax-exempts, including charitable and religious organizations. In light of petitioner's contention that it desires to seek development of an income-producing improvement on its property while maintaining its religious presence as well, section 207-8.0a(2) is clearly applicable.

Once the Commission finds that the applicant has established the preliminary showing of insufficient return, section 207-8.0 authorizes the Commission to devise

alternatives which would permit the owner a reasonable return or beneficial use of his property. With respect to tax-exempt properties, the statute additionally provides that the Commission has the right to find a purchaser or tenant who will purchase or lease the landmark under reasonably equivalent financial terms to the contingent contract already made. The Commission may also propose alternative plans to alleviate hardship. Failing this, the Commission may recommend that the City seek to acquire an appropriate protective interest in the property. §207-8.0(i). The City must, within 90 days, initiate condemnation or purchase such a protective interest. Otherwise the Commission must issue a Notice to Proceed with demolition or inappropriate alterations.

In situations where there is no existing agreement to sell or lease the improvement,

the Commission has applied the test for determining hardship which was established in Sailors' Snug Harbor v. Platt, 29 AD2d 376 (1st Dept., 1968), 288 NYS2d 314, for those situations where the landmark's owner does not desire to alienate the property and is therefore unable to obtain relief under the statutory provisions applicable to not-for-profits. This test was subsequently adopted by the New York Court of Appeals in Lutheran Church in America v. City of New York, 35 NY2d 121 (1974), 316 NE2d 305, and Society for Ethical Culture v. Spatt, 51 NY2d 449 (1980), 415 NE1d 922. This test requires that the landmark designation restrictions not be applied where "maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose." Sailors' Snug Harbor, supra, 29 AD2d at 378, 288 NY2d at 316.

Upon such a finding, relief must be provided either through alternatives or relinquishment of the landmark restrictions. Sailors' Snug Harbor developed a procedure, adopted by the Court of Appeals, for determining when a not-for-profit organization has articulated facts under which maintenance so interferes with the charitable purpose (29 AD2d at 378, 288 NYS2d at 316):

> "[T]he answer would depend on the proper resolution of subsidiary questions, namely, whether the preservation of these buildings would seriously interfere with the use of the property, whether the buildings are capable of conversion to a useful purpose without excessive cost, or whether the cost of maintaining them without use would entail serious expenditure - all in the light of the purposes and resources of the petitioner."

Accordingly, in those instances where a charitable or religious institution owning a designated landmark does not wish to sell or lease its property in order to qualify for a

Notice to Proceed with a proposed alteration or demolition, the statute is interpreted to provide adequate relief. The Commission, applying this test in several instances, has permitted the total demolition of a landmark.

The affidavit of the Chairman of the Landmarks Commission in support of the motion for summary judgment, describes two instances in which the Commission has applied the judicially-created hardship test, one requesting partial and the other total demolition of buildings subject to the strictures of the Landmarks Law. The first of these applications was made in 1979 by the Episcopal Diocese of Brooklyn. The Diocese owned a church in the Fort Greene section of Brooklyn which had been destroyed by a fire. Rather than rebuild the Church, the Diocese determined that it would build housing for the elderly and sought funding from the Department of

Housing and Urban Development. When the Department informed the Diocese that the site was too small, the Diocese purchased an Italianate brownstone adjacent to the site. However, since the Commission had, in the interim, designated the Fort Greene Historic District, the Diocese could not demolish the brownstone without permission from the Commission. In this instance, the Diocese was faced with the threat of losing its mortgage commitment if it did not obtain its building permit within three months. Because of the severe time constraints, the Commission calendared for the same day a public hearing for an application for a Certificate of Appropriateness and an application based on hardship. The Commission denied the application for a Certificate of Appropriateness for demolition of the brownstone. However, acting on the hardship application, the Commission found

that any attempts to modify the design of the project to prevent the demolition would jeopardize the availability of the HUD mortgage, and that for the Commission to require the Diocese to sell or long-term lease the property would have frustrated the charitable purposes of the Church. The Commission therefore issued a Notice to Proceed with the demolition and the new construction. The entire procedure took just over two months from the initial filing of the applications.

The second of these hardship applications was made by the Marymount School, a Roman Catholic college preparatory school with a predominately female enrollment, to construct a rooftop gymnasium on three Beaux Arts townhouses on Fifth Avenue between East 83rd and East 84th Street. The buildings lie within the Metropolitan Museum Historic District. The

school determined that it needed its own gymnasium built on its rooftop and applied to the Commission for a Certificate of Appropriateness pursuant to §207-6.0, which was denied by the Commission on the ground that the plans detracted from the facades of the three townhouses. Marymount then applied for a Notice to Proceed pursuant to §207-8.0, submitting a revised plan. The Commission, finding the proposed addition still architecturally inappropriate and in view of the fact that the school had no desire to alienate the property, applied the judicially-created test for hardship applicable to non-profit institutions such as Marymount, i.e., whether lack of the gymnasium physically or financially prevented or seriously interfered with the carrying out of its charitable purpose. The Commission found that Marymount satisfied the test for establishing hardship; thereafter, the

Commission was unable to come up with a reasonable alternative (although alternatives were explored) and granted the Notice to Proceed with inappropriate alterations. The Commission was able both to preserve the building and satisfy the owner. Two cooperative corporations which own apartment houses adjacent to Marymount thereafter commenced an unsuccessful Article 78 proceeding in which they challenged, inter alia, the jurisdiction of the Commission to apply the judicial, as opposed to statutory, test of hardship. 1025 Fifth Avenue, Inc. v. Marymount School of New York and Landmarks Preservation Commission of the City of New York, Index No. 14910/83, N.Y.L.J. 12/30/83, p. 6, col 1. (Sup. Ct. N.Y. Co.). The Court held that the Commission could apply the test.

Had petitioner herein availed itself of this efficient procedure, the relief could

have been obtained in a far smaller fraction of the time and cost than the instant litigation has engendered. In addition, a record would have been sufficiently developed to permit judicial review in case petitioner was not satisfied with the Commission's relief.

As described above, the Commission may grant permission to construct, reconstruct, alter or demolish a particular building upon the application of an owner. §207-6.0. In this regard, it must be noted that only the exterior of the church and parish house have been designated a landmark. The potential for development of creative alternatives to demolition is enormous. The Commission may recommend amendments to the Zoning Resolution, §207-2.0(i), and may assist the owner with modification of bulk and use requirements or the transfer of development rights under the

Zoning Resolution.[4] See, N.Y.C. Zoning Resolution, sections 74-79, 74-711, 74-712, 74-721. Particularly useful is section 74-711 of the Zoning Resolution, which authorizes the Landmarks Preservation Commission to apply to the City Planning Commission for a modification of the use and bulk regulations applicable to the zoning lot upon which the landmark is situated. Similarly, section 74-79 provides for the transfer by special permit of unused development rights from a landmark to an "adjacent site", which need

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[4]Such a tack was, in fact, taken in the case of Villard Houses, on the east side of Madison Avenue between 50th and 51st Streets in New York City. See N. Marcus, Villard Preserv'd: Or, Zoning For Landmarks in the Central Business District, 44 Bklyn. L. Rev. 1 (1978). The utilization of these provisions is not limited to situations where the owner is seeking to alter inappropriately or demolish, and have frequently been used by owners in connection with applications for Certificates of Appropriateness under §207-6.0.

not be contiguous. Such possibilities are particularly relevant to the case at bar, in which a portion of the lot occupied by the Church is not designated and is owned by the same party. Similarly, if the owner can establish hardship, these provisions as well as tax abatement and other powers of the City could be utilized.

4. Petitioner has failed to demonstrate any infringement of its right to free exercise of religion by reason of its landmark designation or the requirement that an application be made to Commission to alter or demolish.

The Free Exercise clause is not a talisman which automatically protects religious organizations from any governmental regulation. E.g., Tony and Susan Alamo Foundation v. Secretary of Labor, 473 U.S. ___, 105 S. Ct. 1953, 1963-1964 (1985), (minimum wage, overtime and recordkeeping under the Fair Labor Standards Act does not

interfere with free exercise of religion); United States v. Lee, 455 U.S. 252 (1982) (requiring compliance of Amish employers and employees with Social Security tax scheme); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) ("[f]ire inspections, building and zoning regulations . . . are examples of necessary and permissible contacts"); EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), cert. denied sub nom. Mississippi College v. EEOC, 453 U.S. 912 (1982) (applying Title VII to educational institutions which are owned, controlled and operated by religious organizations). Rather, the Free Exercise clause proscribes government action that burdens religious beliefs or practices, unless the challenged action serves a compelling governmental interest that cannot be achieved in a less restrictive manner. Thomas v. Review Board, 450 U.S. 707 (1981); Sherbert v.

Verner, 374 U.S. 298 (1963). See also Bower v. Roy, 476 U.S. ___, 106 S. Ct. 2147, 2156 (1986) (plurality opinion) (neutral and uniformly applicable statute is valid if it is "a reasonable means of promoting a legitimate public interest."). The mere fact that a religious practice is burdened by a governmental program does not mean that an exemption accommodating that practice must be granted. Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983), cert. denied ___U.S.___, 104 S. Ct. 72 (1983); Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), cert. denied ___U.S.___, 104 S. Ct. 371 (1983).

In the instant case, petitioner has failed to demonstrate that either the Landmarks Law or the landmark designation of its property infringes its right to freedom of religion. It is clear that defendants have

not regulated, prohibited or rewarded their religious practices or belief as such, nor have they in any manner burdened the plaintiffs in their religious practices or beliefs.

Petitioner claims that designation of its property as a landmark physically prevents it from carrying out its religious and charitable purposes which can only be effectuated in a new or reconstructed building. As we have already demonstrated, if this claim had been established before the Commission, the Landmarks Law itself provides for relief under these circumstances. Petitioner has offered no legally adequate justification for its failure to seek such relief from the Commission. Even if this Court were to find the claim ripe for review, petitioner has not demonstrated an infringement upon its right to free exercise of religion based upon its purported inability

to reconstruct its building as a consequence of landmark designation.

In fact, the prime ingredient in petitioner's rebuilding plan appears to be the construction of a high-rise income-producing residential building. However, secular enterprises, even when operated by religious groups, are not afforded protection under the religion clauses of the First Amendment. Tony and Susan Alamo Foundation v. Secretary of Labor, supra, 473 U.S.___, 105 S. Ct. 1953, 1964; United States v. Lee, supra, 455 U.S. at 261.

In Penn Central Transportation Co. v. New York City, supra, 438 U.S. at 135, this Court likened the restrictions imposed by the Landmarks Law to prohibitions by zoning regulations, stating:

> "This is no more an appropriation of property by government for its own uses than is a zoning law prohibiting, for 'aesthetic' reasons, two or more adult

> theaters within a specified area, see Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), or a safety regulation prohibiting excavations below a certain level. See Goldblatt v. Hempstead."

This Court has stated that religious organizations are not exempt from such secular governmental activity as "fire inspections and building and zoning regulations." Lemon v. Kurtzman, supra, 403 U.S. at 614. Certainly the landmark restrictions, upheld in Penn Central as reasonable governmental restrictions for the common good, cannot be said to infringe upon the free exercise of religion simply because they are applied to a church. See Penn Central Transportation Co. v. New York City, supra, 438 U.S. at 135. Therefore, petitioner's claim that any and all regulation by a governmental agency of an objecting owner of a religious landmark is

unconstitutional is unsupported by the holdings of this Court.

5. As a result of the procedural posture of the instant case, the issues sought to be raised by petitioner are undeveloped and therefore, should not be reviewed at this juncture by this Court.

Since petitioner has steadfastly refused to make any application for relief from the strictures of its landmark designation, the record is sparsely developed. Despite petitioner's assertion that, because summary judgment was granted to respondents, the facts placed in evidence must be deemed true (citing Bishop v. Wood, 426 U.S. 341, 347 n.11 [1976]), it is clear that only those facts material to genuine disputes involving the issue on which summary judgment was granted must be resolved in petitioner's favor. Since the issue on which judgment was granted is whether petitioner is required to apply to the Commission for relief from

the requirements of designation as a landmark, facts regarding petitioner's financial status and its plans for rebuilding are not relevant to the issue of whether or not an application should first be made to the Commission. As noted by this Court in Penn Central, "[s]ince appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the air-space above the Terminal." 438 U.S. at 137. Likewise in the instant case, the Court could not know from the present record what petitioner intends to do with its property or whether some plan to save all or some of the landmarked facade, while fully accommodating petitioner's needs, can be found. Moreover, the issue of free exercise remained peripheral to the issue of ripeness, petitioner arguing that it was not required to apply to the Commission because

Patsy v. Florida Board of Regents, supra, 457 U.S. 496 (1982), held that section 1983 actions did not require exhaustion of administrative remedies.

In sum, we submit that, in view of the recent holdings of this Court on the issue of ripeness for review, the decision of the New York Court of Appeals herein was correct and review by this Court would serve no judicial purpose. Moreover, while the decisions of this Court interpreting the Free Exercise Clause of the First Amendment leave no doubt concerning the constitutionality of the Landmarks Law as applied to religious buildings, in any case, the present record does not provide a basis on which to adjudicate the issue fully and properly.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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Respectfully submitted,

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